**STATE OF MICHIGAN**

**IN THE SUPREME COURT**

**PEOPLE OF THE STATE OF MICHIGAN**

Plaintiff-Appellee

-vs-

**MASALMANI, IHAB**

Defendant-Appellant
_____/

**Supreme Court No.** _____

**Court of Appeals No.** 325662

**Lower Court No.** 09-5244-FC

**MACOMB COUNTY PROSECUTOR**
Attorney for Plaintiff-Appellee
_____

**VALERIE NEWMAN P 47291**
Attorney for Defendant-Appellant
_____

# APPLICATION FOR LEAVE TO APPEAL

**STATE APPELLATE DEFENDER OFFICE**

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**MASALMANI, IHAB,**

Defendant-Appellant.
_____/

**CERTIFICATE OF SERVICE**

TO:

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**Valerie Newman**, attorney at law, says that on November 17, 2016, she sent one copy of the following:

**APPLICATION FOR LEAVE TO APPEAL**

Respectfully submitted,

**STATE APPELLATE DEFENDER OFFICE**

BY: /s/Valerie Newman
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November 17, 2016

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## JUDGMENT APPEALED FROM AND RELIEF SOUGHT

The Supreme Court in *Miller v Alabama* required states to consider mitigating factors when determining that a life sentence is appropriate for a juvenile defendant. 132 S Ct 2455; 183 L Ed 2d 407 (2012). While the Supreme Court has provided a non-exhaustive list of factors that the Michigan Legislature adopted in MCL 769.25, this Court has not had the opportunity to provide guidance to sentencing courts on how to apply these factors in a *Miller* hearing.

Ihab Masalmani, a juvenile sentenced to life without parole, exemplifies a youth whose crimes reflect transient immaturity, but such youth was not considered in making his sentencing determination. This case presents questions of how the *Miller* factors should be weighed and considered, how sentencing courts should approach the analysis, appellate courts' responsibility in reviewing a juvenile life-without-parole sentence, and the role of a jury in making this determination.

Ihab Masalmani was convicted of first-degree murder and other crimes at the age of 17 and sentenced to life in prison without the possibility of parole. Following *Miller*, the Court of Appeals remanded Mr. Masalmani's case for resentencing in compliance with *Miller* and MCL 769.25. *People v Masalmani*, unpublished opinion per curiam of the Court of Appeals issued March 19, 2013 (Docket No. 301378).

During the requisite *Miller* hearing, evidence was presented and witnesses testified to three of the *Miller* factors: his chronological age and its hallmark features, family and home environment, and the possibility of rehabilitation. Despite mitigating evidence showing that Mr. Masalmani had a difficult childhood precipitated by the Michigan foster care system, was an immature youth, and has exhibited positive rehabilitative strides while incarcerated (including

taking responsibility for his crimes), the trial court resentenced him to life without parole. (Trial Court Opinion, 9).

The sentencing court failed to give credence to *Miller* by not considering the facts presented in the hearing, and relying on her own opinions regarding the testimony rather than facts. The judge made it unmistakably clear that she weighed the circumstances of the crime more heavily than the circumstances of his family background, age and its hallmark features, or his rehabilitation. In fact, the court found that all of the factors in Mr. Masalmani's case served as aggravating factors rather than mitigating factors – contrary to *Miller's* guidance. (*See*, Trial Court Opinion, 3-8). In particular, Judge Druzinski found that Mr. Masalmani's traumatic childhood, while weighing in favor of the defendant, reduced his likelihood of rehabilitation.

Upon appeal of the sentence of life without parole, the Court of Appeals rubber-stamped the sentencing court's decision without conducting a searching inquiry or viewing the sentence as inherently suspect. *People v Masalmani*, unpublished opinion per curiam of the Court of Appeals issued September 22, 2016 (Docket No. 325662). The court concluded that "the trial court accurately analyzed each of the *Miller* factors and correctly concluded that defendant is the rare juvenile offender whose crime reflects irreparable corruption." *Id*. at 7. The court also found that the trial court did not err by failing to empanel a jury at the *Miller* hearing.

The Court of Appeals has examined these issues at length and provided guidance in *People v Hyatt*, ___ Mich App ___; ___NW2d ___ (2016) (Docket No. 325741). The conflict panel explained that

> all that is mandated by MCL 769.25 is the individualized sentencing required, as stated in *Miller* . . . The analysis on the *Miller* factors does not aggravate punishment; instead, the analysis acts as a means of *mitigating* punishment because it acts to caution the sentencing judge against imposing the maximum punishment . .

> . a sentence which *Montgomery* cautioned is disproportionate for "the vast majority of juvenile offenders."

*Id*. at ___; slip op at 18 (quoting *Montgomery v Louisiana*, 136 S Ct 718, 736; 193 L Ed 2d 599 (2016)).

Furthermore, the conflict panel cautioned the sentencing courts to "do more than pay mere lip service to the demands of *Miller*," and to be cautious of imposing the maximum possible sentence "*in the face of compelling mitigating circumstances*." *Id*. at ___; slip op at 26 – 27, quoting *People v Milbourn*, 435 Mich 630, 635; 461 NW2d 1, 2 (1990). Finally, the panel instructed the appellate courts to apply a "heightened degree of scrutiny" and view a juvenile life without parole sentence as "inherently suspect." *Id*. at ___; slip op at 26. An abuse of discretion may be found "if a sentencing court fails to consider a relevant factor that should have received significant weight, [or] gives significant weight to an improper or irrelevant factor . . . ." *Id*. at ___; slip op at 27,quoting *United States v Haack*, 403 F3d 997, 1004 (CA 8, 2005).

The sentencing court paid mere lip service to the demands of *Miller* to determine that Mr. Masalmani should be resentenced to life without parole. The court failed to perform an individualized sentencing by not considering all of the mitigating factors presented during the *Miller* hearing, failed to consider these factors for their mitigating effect exclusively, and improperly applied weight to unfavorable factors. The court summarily reviewed the evidence and made a pretextual analysis in order to back track into the outcome it desired, sentencing Mr. Masalmani to die in prison. Likewise, the appellate court, in its review, failed to apply a heightened degree of scrutiny as instructed in *Hyatt*, ___ Mich App ___; slip op at 26.

On October 31, 2016 the Supreme Court of the United States remanded several cases to the Arizona trial courts because the trial courts failed to address "the question Miller and Montgomery require a sentence to ask: whether the petitioner was among the very "rarest of

juvenile offenders, those whose crimes reflect permanent incorrigibility". 577 U.S. at ____ (slip op., at 17)" *Tatum v Az*, ___ US ___(2016)(No. 15-8850)

In light of the overwhelming precedence in support of an individualized sentencing that considers the *Miller* factors for their mitigating effect, and the significant mitigating evidence put forth to the trial court, Mr. Masalmani respectfully requests this Court remand this case to the trial court to properly apply the *Miller* factors and for the Court to determine whether Ihab Masalmani is among the very rarest of juvenile offenders.

## STATEMENT OF QUESTIONS PRESENTED

**I. DOES THE IMPOSED LIFE WITHOUT PAROLE SENTENCE VIOLATE IHAB MASALMANI'S EIGHTH AMENDMENT AND DUE PROCESS RIGHTS WHERE THE COURT FAILED TO ADHERE TO INDIVIDUALIZED SENTENCING, FAILED TO PROPERLY CONSIDER AND APPLY THE *MILLER* FACTORS, AND FAILED TO APPLY THE PROPER STANDARD OF REVIEW?**

Court of Appeals answers, "No".

Defendant-Appellant answers, "Yes".

**II. IS IHAB MASALMANI, CONVICTED OF A FIRST-DEGREE MURDER COMMITTED WHEN HE WAS UNDER THE AGE OF 18, ENTITLED TO A JURY DETERMINATION OF ANY/ALL FACTS THAT EXPOSE HIM TO A LIFE WITHOUT PAROLE SENTENCE, WHICH IS A DEPARTURE FROM THE DEFAULT TERM OF YEARS SENTENCE?**

Court of Appeals answers, "No".

Defendant-Appellant answers, "Yes".

## STATEMENT OF FACTS

Ihab Masalmani was convicted as charged in three separate cases, of a total of 18 charges[1], the most serious of which was first-degree murder. The cases involved three separate episodes: (1) a bank robbery, (2) an unsuccessful carjacking, and (3) the kidnapping and death of Matthew Landry. Judge Druzinski, who presided over the trial, sentenced Mr. Masalmani to life in prison without the opportunity for parole, the mandatory sentence for first-degree murder in Michigan at the time of his sentencing..

Following Mr. Masalmani's sentencing, but before his appeal was finalized, the United States Supreme Court decided *Miller v Alabama*, 132 S Ct 2455; 183 L Ed 2d 407 (2012). The Supreme Court in *Miller* held that the imposition of mandatory life sentences without parole upon juveniles constituted cruel and unusual punishment. *Id*. at 2469. Following *Miller*, the Court of Appeals remanded Mr. Masalmani's case for resentencing in compliance with the holding of *Miller* and MCL 769.25. *People v Masalmani*, unpublished opinion per curiam of the Court of Appeals issued March 19, 2013 (Docket No. 301378).

Under MCL 769.25, since the prosecution sought a non-parolable sentence, the trial court held a sentencing hearing in October 2015. The witnesses included experts in adolescent brain development, psychology, and areas of child welfare and juvenile delinquency proceedings, as well as child welfare professionals who worked closely with Mr. Masalmani throughout his childhood. No testimony was offered regarding the circumstances of the homicide offense,

[1] In case #09-5244 Mr. Masalmani was charged and convicted of (1) larceny from the person (MCL 750.357), (2) conspiracy to kidnap and (3) kidnapping (MCL 750.349), (4) conspiracy to carjack and (5) carjacking (MCL 750.529a), felony murder (MCL 750.316b) and felony firearm (MCL 750.227b). In case #09-5144 Mr. Masalmani was charged and convicted of carjacking (MCL 750.529a), receiving and concealing weapons (MCL 750.535b) and felony firearm (MCL 750.227b). In case #09-4832 Mr. Masalmani was charged and convicted of two counts of armed robbery (MCL 750.529), kidnapping (MCL 750.349), bank robbery (MCL 750.531a), and 4 counts of felony firearm (MCL 750.227b).

however the parties' stipulated to the following statement of facts for purposes of Mr. Masalmani's sentencing hearing:

> Following a jury trial, Defendant-Appellant Ihab Masalmani was convicted as charged, in three separate cases, of 18 charges, the most serious of which was first-degree murder. The cases involved three separate episodes: (1) the kidnapping and death of Matthew Landry, (2) a bank robbery of a Flagstar bank, and (3) an unsuccessful carjacking in the parking lot of a Wal-Mart.
>
> On August 9, 2009, Michael Sawyer and Jessica McKinney were working at the Quizno's when Mr. Masalmani entered the store and asked for some water. 9/23/10 at 120, 122, 175, 178-181. Mr. Sawyer had seen Mr. Masalmani and a black male riding their bikes in the parking lot across the street from the store. Id. at 125
>
> Matt Landry entered the store shortly after Mr. Masalmani and his companion left the store. Id. at 144; 191-192. Approximately 30 minutes after all three had left the store the police arrived and asked if the employees had seen anything. Id. at 159-160.
>
> Carol Santangelo, a hairdresser who worked in a salon across from the Quizno's, noticed three boys pushing each other around near a green car. It looked like two of the guys were against the third one. She later saw police cars at the Quizno's. 9/23/10 at 214-221, 225.
>
> Lawrence Wata and his wife and daughter were in their car near Quizno's. Id. at 243-244. Mr. Wata saw three guys by a green car and thought something was amiss. He also thought one of the guys had a gun. Id. at 247-260; 9/28/10 at 9. He later identified Mr. Masalmani and Mr. Taylor as two of the guys he saw, and Mr. Taylor as the one he believed had a gun. 9/28/20 at 14-16. Mr. Wata saw Mr. Masalmani put Mr. Landry in a headlock and attempt to get him into the trunk of the car. Eventually, the three guys all drove off in the car. 9/28/10 at 26-40. Mr. Wata called the police. Id. at 49.
>
> Essa Rahime worked at a gas station located at 7 Mile and Hayes in Detroit. 9/24/10 at 98-101. He knew Mr. Masalmani and identified him as coming into the store on August 9, 2009, using the ATM machine and buying a white t-shirt that he changed into in the store. Id. at 102-106. Surveillance cameras captured the activity and he shared those with the police. Id at 108.
>
> Detective Blackwell reviewed surveillance video from two different gas stations. Mr. Masalmani was seen using Mr. Landry's ATM

card, 9/28/10 at 106-107, and exiting Mr. Landry's car with two women. Id. at 118-122.

Eddie Collins lived in Detroit and saw a green car with nice rims parked in front of his house on August 9. He noticed two men, one of whom he identified as Mr. Masalmani, looking in the trunk of the car. 9/28/10 at 153-155, 157-160.

Frederick Singleton, a state prisoner with a number of convictions dating back 20 years, testified that he would hang out in the area where Mr. Landry's body was found and knew Mr. Masalmani and the co-defendant, whose family lived in the area. 9/29/10 at 197, 201-202, 208, 210. According to Singleton, he saw Mr. Masalmani, the co-defendant, and Matt Landry arrive in Detroit in a green car on August 9 at approximately 9:00 pm. Id. at 215-216.

According to Singleton, the three men and two women went with him into a house. In the house Mr. Masalmani gave Singleton $100 to buy drugs. Id. at 217-220. Then Singleton, the women and Mr. Masalmani smoked crack cocaine. Id. at 221.

Singleton left to get more drugs, and when he returned two other people were present and one handed Mr. Masalmani a gas can. Id. at 229-230. Singleton left around 10:00pm. He never saw anyone with a gun, Id. at 232, although Mr. Taylor was known to carry a gun and Mr. Masalmani had the reputation for doing so. Id. at 238-239.

On August 11, two days after Mr. Landry's disappearance, the police started searching for Mr. Landry in Detroit. 9/28/10 at 220. The police found his body in a burned out home. 9/29/10 at 18-20. From the position of the body the police surmised that Mr. Landry was kneeling when he was shot in the back of the head. Id. at 26-27.

When Mr. Landry's body was discovered there had been extensive decomposition of the body and especially the head. 9/24/10 at 128. The cause of death was a gunshot wound to the head. Id. at 132, 140. The manner of death was determined to be homicide. Id. at 140-141. Bullet casings were recovered from the house and street; none matched the gun recovered from Mr. Masalmani at the time of his arrest. 9/29/10 at 138.

On August 10, 2009, Mr. Masalmani walked into a Flagstar Bank, put a gun to the head of customer Sarah Maynard and demanded $50,000 from the teller under threat that he would kill Ms. Maynard if he did not receive the money. 9/21/10 at 105, 108 (testimony of Jessica Reeber); 146-147 (testimony of Sarah Maynard); 167-168 (testimony of Walter Stepanenko Jr.); 191-192 (testimony of Kristin Sarti). The teller was unable to open the safe and handed over the

> money from her drawer, approximately $6000.00, which included bait money. 9/21/10 at 109-110, 117, 134, 136, 138-139.
>
> Mr. Masalmani was in the bank for approximately 3-4 minutes. Id at 136. During that time he pointed the gun at each of the 2 employees and 2 customers in the bank, Id. at 111, 119, 169, 194, took money from customer Stepanko's wallet, Id. at 173, and went through customer Maynard's purse but did not take anything. Id. at 149, 157.
>
> Following the robbery Stephanie Stewart, who lived near the Flagstar Bank, saw Mr. Masalmani get in a green Honda, which she noticed because it was out of place in the neighborhood, and drive off after picking himself up from having fallen in a ditch. 9/22/10 at 14-21.
>
> Following the robbery and media coverage, Stacey Edwards called the police because she recognized the bank robber as a customer from the clothing store she managed. 9/22/10 at 34, 37-38.
>
> The day after the bank robbery, David Hassroune stopped to shop at a Wal-Mart. While sitting in his car in the parking lot, Mr. Masalmani, armed with a gun, approached and told him to get out of the car. 9/22/10 at 55, 59, 63-65. The incident was captured on a surveillance camera. Id. at 74-79. Upon arrest, a gun, a gun clip and other items were recovered from Mr. Masalmani and the surrounding area. 9/22/10 at 104-106 (Officer Kleinedler); 143-154 (Officer Berger); 166, 171, 172-173 (Officer Lukasavage); 176, 185-186 (Officer Otto).
>
> The parties also agreed that all record of the trial and sentencing proceedings were part of the record for the sentencing hearing.

Stipulated Statement of Facts for Purposes of Sentencing Hearing. Lower court record.

***Resentencing Hearing***

Dr. Daniel Keating, a Professor of psychology, psychiatry, and pediatrics, focused on the science behind adolescent brain development which showed the "hallmark features" of juveniles of Mr. Masalmani's age. (Resentencing, 10/21/14 21).

The testimony of Jennifer Keller, Mr. Masalmani's social worker, and William Ladd, his guardian ad litem for a number of years, was offered to show the circumstances of Mr. Masalmani's upbringing, as well as their personal opinions regarding Mr. Masalmani as a

person. (Resentencing, 10/21/14 76, 102). Both Ms. Keller and Mr. Ladd worked with Mr. Masalmani throughout his childhood and offered insight into the specific circumstances of his family and home environment as well as his personality and behavioral patterns during that time.

Finally, the testimony of Dr. Frank Vandervort, as well as Dr. Lyle Danuloff, was offered to show Mr. Masalmani's potential for rehabilitation. Dr. Vandervort is an expert in areas of child welfare and juvenile delinquency proceedings, and Dr. Danuloff is an expert in clinical psychology who evaluated Mr. Masalmani in-person on multiple occasions. (Resentencing, 10/24/14 4; 36). The testimony relevant to each of the Miller factors is summarized below.

Dr. Daniel Keating

Dr. Daniel Keating, a neuroscientist and expert in adolescent brain development, explained how the human brain develops and the differences between the adolescent brain and a mature adult brain. (Resentencing, 10/21/14 16-35). The limbic system (or "bottom brain"), which includes the brain's arousal, incentive, and reward systems, functions as the trigger for a lot of emotional reactions. (Resentencing, 10/21/14 19-20). The arousal, incentive, and reward systems located within the bottom brain are more active during an individual's adolescence than "it will be at any other point in life." (Resentencing, 10/21/14 22). The only brake on the bottom brain is the prefrontal cortex (or "top brain"), which controls higher level brain functions like judgment, decision-making, and impulse control. (Resentencing, 10/21/14 19, 22-23). The top brain develops in a linear fashion and does not reach full maturity until the mid-20s. This is unlike the bottom brain, which peaks during adolescence and falls off by mid-to-late 20s.

The adolescent development maturity mismatch manifests itself in several different ways that lead youth to behave differently from mature adults. (Resentencing, 10/21/14 25). For example, when adolescents are in arousing or high emotion situations, impulsivity is more likely to prevail

than good judgment, leading adolescents to make poor choices. (Resentencing, 10/21/14 25).

Once engaged in negative activities, adolescents become fully absorbed and lack the capacity to reflect on how or whether they should cease those negative activities. They have an inherently diminished capacity to change paths once a decision has been made. (Resentencing, 10/21/14 25). Dr. Keating explained how one bad decision by an adolescent can have a devastating spiraling effect. (Resentencing, 10/21/14 25-26). Dr. Keating testified that most adolescents are able to understand and articulate the difference between right and wrong. (Resentencing, 10/21/14 53). Even with an understanding that their conduct may be "wrong," adolescents lack that capacity to evaluate the benefits and/or future consequences of their actions in the same manner an adult would. (Resentencing, 10/21/14 53).

Jennifer Keller and William Ladd

During the sentencing hearing, testimony regarding the circumstances of Mr. Masalmani's childhood was offered by Jennifer Keller and William Ladd. Ms. Keller was Mr. Masalmani's social worker who worked with him until he was 13 years old, and Mr. Ladd was Mr. Masalmani's attorney in juvenile court and his guardian ad litem who worked with Mr. Masalmani from his entry into the Department of Human Services (DHS) through his arraignment in this case. (Resentencing, 10/21/14 76-99, 102-135).

Mr. Masalmani first came to the United States after his mother sent him, along with his sister, from Lebanon to live in the United States with relatives. (Resentencing, 10/24/14 105, 107). Mr. Masalmani was around eight years old and did not speak English or have any personal connection to anyone living in the United States. (Resentencing, 10/24/14 82-83, 104-106; Resentencing, 10/24/14 24-25). Mr. Masalmani's experience upon entering this country was deplorable; he and his sister suffered medical neglect, physical abuse, sexual abuse, and were

never placed in school. When asked how she would describe Mr. Masalmani's background, Ms. Keller responded: "Chaotic. Traumatic." (Resentencing, 10/21/14 82).

As described by Professor Frank Vandervort, an expert in child welfare and juvenile delinquency proceedings, a great deal of trauma was inflicted upon Mr. Masalmani while he was in the foster care system. (Resentencing, 10/24/14 9-29). Mr. Masalmani's home life was never stable and supportive, and he was removed from the only home in which he felt safe and loved at a very young age, which only caused him to continue misbehaving and distrusting those around him. (Resentencing, 10/21/14 84-85). The lack of stability and support in his life, as well as his exposure to drugs and street-life led Mr. Masalmani to often act out in social settings by fighting in school, displaying aggression towards peers and teachers, and walking out of class. (Resentencing, 10/21/14 87).

Mr. Ladd testified that this behavior, acting out in order to be removed from an unwanted placement, is very common among the foster children he worked with throughout his career. (Resentencing, 10/21/14 115-116). Mr. Ladd described this generality about kids growing up in foster care as follows: "The more placements they have the less ability they have to adjust and adapt to the particular placement and they'll use the only kind of tool that they have to get out of a situation they have trouble coping with by misbehaving, and that essentially builds on itself." (Resentencing, 10/21/14 126).

As Mr. Masalmani grew up in the foster care system, he never received the comprehensive needs assessment or service plan required by law, instead receiving piecemeal services that were incomplete and inadequate. (Resentencing, 10/24/14 18-19). This was especially critical in Mr. Masalmani's case because his needs were unique and specific to his background. (Resentencing, 10/24/14 24-25).

Mr. Ladd worked with Mr. Masalmani from 2001 through 2009 as his guardian ad litem. (Resentencing, 10/21/14 107). He found Mr. Masalmani to be immature for his age, even into his teenage years. (Resentencing, 10/21/14 108).

Ms. Keller worked with Mr. Masalmani extensively and during that time could always see that Mr. Masalmani was trying the best he could to change his behaviors. At times, Mr. Masalmani's caseworker, Ms. Keller, disagreed with DHS or service providers about what was best for him. (Resentencing, 10/21/14 83, 89). For example, Ms. Keller repeatedly requested Mr. Masalmani receive an individualized educational plan (IEP) to help with his struggles in school, but the school district decided Mr. Masalmani did not qualify for an IEP. (Resentencing, 10/21/14 89).

Only after Mr. Masalmani continued to struggle in school and Ms. Keller persisted in her requests, did Mr. Masalmani get the IEP he needed. (Resentencing, 10/21/14 89). When special education services, such as tutoring through the Sylvan Learning Center, were made available to Mr. Masalmani, he enjoyed them and wanted to learn. (Resentencing, 10/21/14 90). In addition to his academic struggles, Mr. Masalmani was also diagnosed with ADHD, depression and pediatric seizures at a very young age. (Resentencing, 10/21/14 85). (Resentencing, 10/21/14 93). In her experience as a children's case worker, Ms. Keller had come across kids where she felt it was inevitable that the child would end up in the criminal justice system. Mr. Masalmani was not one of those kids. Department of Corrections Record

As for any troubled, seventeen year old in the Department of Corrections, Mr. Masalmani had a rough start in prison. Report of Social Worker Nicole George, Appendix A. Over the years, Mr. Masalmani made significant progress. (Resentencing, 10/24/14 51). Some of this was the result of Mr. Masalmani's maturation consistent with his chronological age and natural

brain development. (Resentencing, 10/21/14 32-35). Some of Mr. Masalmani's progress was due to his own self-help efforts during the time he spent incarcerated. (Resentencing, 10/24/14 50-52).

Dr. Danuloff observed, "he does the best he can to stay in his head and think which is quite different than the young man who was out on the streets who -- the only thinking that he did then in that amoral way was, what do I need and how do I get it." (Resentencing, 10/24/14 51).

Mr. Masalmani was working as the barber for the other prisoners in his cell block. (Resentencing 10/24/14 52). He was also participating in GED programming and served as the representative for his cell block, which required regular meetings with the warden of his facility. (Resentencing 10/24/14 51-52). While his criminal history was wrought with non-compliance, his incarceration has shown him to be more compliant as he ages and matures. Report of Social Worker Nicole George, Appendix A, 5-6.

Mr. Masalmani indicated that his current incarceration has had a significant impact on him and how he thinks about the world, himself, and how he makes choices. (Appendix A 2). In addition to the positive impact incarceration has had on Mr. Masalmani's development and maturity, Mr. Masalmani has benefitted from his own self-help efforts. During the extensive time Mr. Masalmani spent in segregation, or solitary confinement, he began to read a lot of books, such as the Bible and other books about religion, morality, and how people relate to one another. (Resentencing, 10/24/14 49-50).

Dr. Danuloff evaluated Mr. Masalmani for the purpose of the resentencing and concluded that Mr. Masalmani has a capacity for rehabilitation that warrants a term of years.[2] (Resentencing, 10/21/14). Not only did Dr. Danuloff conclude that Mr. Masalmani has that

[2] Ms. George concurred in Dr. Danuloff's conclusion. (Appendix A).

capacity, but he also concluded that Mr. Masalmani has demonstrated progress towards rehabilitation. Dr. Danuloff testified that Mr. Masalmani has exhibited early signs of personal growth and introspection, which is critical to rehabilitation. (Resentencing, 10/24/14, 56).

***Outcome of Sentencing Hearing***

Following the two-day hearing, Judge Druzinski found that Mr. Masalmani was properly sentenced to life without the possibility of parole. (Trial Court Opinion, 9). The trial court referred to each of the *Miller* factors in its analysis and considered whether each factor weighed for or against imposing a sentence of life without parole. (Trial Court Opinion, 3-8). Judge Druzinski found that each of the *Miller* factors, apart from Mr. Masalmani's family and home environment, favored the sentence of life without option of parole. *Id*. Judge Druzinski also found that Mr. Masalmani's traumatic childhood, while weighing in favor of the defendant, reduced his likelihood of rehabilitation.

Upon appeal, the Court of Appeals found that the trial court accurately analyzed each of the *Miller* factors and correctly concluded that the defendant is the rare juvenile offender, whose crime reflects irreparable corruption. The court also found that the trial court did not err in failing to empanel a jury, based on the decision by the *Hyatt* conflict panel, stating that a judge, not a jury, is to make a life-without-parole or term of years sentence. *Masalmani*, unpub op at 7, 8.

## I. THE IMPOSED LIFE WITHOUT PAROLE SENTENCE VIOLATES IHAB MASALMANI'S EIGHTH AMENDMENT AND DUE PROCESS RIGHTS WHERE THE COURT FAILED TO ADHERE TO INDIVIDUALIZED SENTENCING, FAILED TO PROPERLY CONSIDER AND APPLY THE MILLER FACTORS, AND FAILED TO APPLY THE PROPER STANDARD OF REVIEW?

***Legal Discussion***

Ihab Masalmani was resentenced pursuant to the United States Supreme Court decision in *Miller v Alabama*, 132 S Ct 2455, 2468; 183 L Ed 2d 407 (2012) and in accordance with MCL 769.25.

*Miller* requires the sentencing Court to carefully consider the juvenile's "lessened culpability" and "greater capacity for change," *Id.* at 2460, by evaluating the following factors:

- "...[C]hronological age and its hallmark features..."
- "…[T]he family and home environment that surrounds him…"
- "…[T]he circumstances of the homicide offense …"
- "…[T]he possibility of rehabilitation…"

(Resentencing, 10/21/14 4-5); *Miller v Alabama*, 132 S Ct at 2468.

At its core, *Miller* establishes that "...a judge or jury must have the opportunity to consider *mitigating* circumstances before imposing the harshest possible penalty for juveniles." *Id.* at 2476 (emphasis added). Furthermore, as summed up by the conflict panel in *Hyatt*, "[t]he Court in *Miller* specifically invoked the 'mitigating qualities of youth' in explaining why individualized sentencing was necessary for the imposition of the harshest possible penalty available for juveniles." *People v Hyatt*, __ Mich App __; __ NW2d __(2016),quoting *Miller*, 132 S Ct at 2467). At its core, *Miller* and MCL 769.25 require both an individualized sentencing

and a hearing where each of the *Miller* factors must be considered for its *mitigating* effect and should not be viewed as an aggravating factor. *Miller,* 132 S Ct at 2467, 2476.

Here, the *Miller* factors show that Mr. Masalmani is not the "rare" or "uncommon" incorrigible youth for whom a sentence of life in prison without the possibility of parole is appropriate. *Miller*, 132 S Ct at 2469. Rather, the record indisputably establishes that Mr. Masalmani not only has the capacity for rehabilitation, but has made progress towards that end. Further, while not part of the testimonial record, Counsel has been witness to Mr. Masalmani's progress, which includes his acceptance of responsibility for his criminal acts and expressions of remorse for the pain and loss he has caused.[3] The sentencing court, in making its determination of a sentence of life without parole for Mr. Masalmani, failed to perform an individualized sentencing by not considering all of the mitigating factors presented during the *Miller* hearing, and also failed to consider these factors for their mitigating effect exclusively, or to weigh them properly. In doing so, Mr. Masalmani was sentenced to a disproportionate sentence, and as explained in further detail below, Mr. Masalmani respectfully requests this Court remand this case to the trial court to properly apply the Miller factors[4] and that a jury make the determination.

[3] Mr. Masalmani has both in writing and in verbal communications conveyed to Counsel the details of the crime and how Mr. Taylor was neither involved with, nor aware of, what was going to happen to Mr. Landry. He has repeatedly expressed remorse for his actions, as well as sympathy and empathy for the Landry family. Mr. Masalmani has consented to Counsel including aspects of their privileged communications in pleadings with full knowledge of the potential repercussions it could have for him with respect to further appeals, the possibility of parole, and this proceeding.

[4] MCL 769.25(9) provides, "If the court decides not to sentence the individual to imprisonment for life without parole eligibility, the court shall sentence the individual to a term of imprisonment for which the maximum term shall be not less than 60 years and the minimum term shall be not less than 25 years or more than 40 years."

### A. *The Trial Court Failed to Perform an Individualized Sentencing*

The evidence presented at Mr. Masalmani's *Miller* hearing revealed that he is not the "rare" or "uncommon" incorrigible youth for whom a sentence of life in prison without the possibility of parole is appropriate. Yet, despite the overwhelming evidence showing Mr. Masalmani's ability for rehabilitation and unfortunate upbringing, the trial court sentenced him to life without parole. The Court in *Miller* stressed the importance of the rarity of circumstances in which a court should impose on a juvenile to the most harsh sentence, and in fact, as this Court has warned in *People v Milbourn*, 435 Mich 630, 653; 461 NW2d 1 (1990), "[w]ith regard to the principle of proportionality, it is our judgment that the imposition of the maximum possible sentence *in the face of compelling mitigating circumstances would run against this principle* . . . ." (emphasis added).

In Mr. Masalmani's case, the trial court committed three errors in applying an individualized sentence. First, the court failed to consider all of the facts of the mitigating evidence provided during the *Miller* hearing when making its determination of life without parole. Secondly, in its determination, the court applied improper weight to the factors, favoring above all else the circumstances of the crime. In addition, the court failed to consider the factors exclusively for their mitigating effect. Upon review of this decision, the appellate court failed to apply a "searching inquiry" of the life without parole sentence for a juvenile. These failures by both these courts violate Mr. Masalmani's Eighth Amendment and Due Process rights and are contrary to the objective of *Miller* and the directives in *Hyatt*.

### *B. The Trial Court Failed to Consider the Facts of Mitigation Evidence Presented*

The trial court sentenced Mr. Masalmani to a disproportionate sentence of life-without-parole by not conducting an individualized sentence when it failed to consider all of the relevant mitigating evidence provided and its relevance to the totality of the offense. The court treated the *Miller* hearing as a perfunctory exercise, through recitation of the cautionary language in *Miller* and by asserting a fair analysis of the mitigating evidence presented, while in reality the trial court simply backtracked into the outcome it desired – life without parole.

The *Miller* Court repeatedly cautioned courts concerning sentencing juveniles to life without parole, which should be reserved for the rarest cases. This cautionary language used by the Court in *Roper*, *Graham*, *Miller* and *Montgomery* must be honored, and sentencing courts are to "do more than pay mere lip service to the demands of *Miller*." *Hyatt*, __ Mich App at __; slip op at 24. In fact, the *Miller* Court discussed how it invalidated a youth death sentence because the trial judge did not consider evidence of the teen's neglectful and violent family background and emotional disturbance. *Miller*, 132 S Ct at 2467. The Court found that evidence "particularly relevant," more so than it would have been for an adult offender. *Id*. Furthermore, the Court held "just as chronological age of a minor is itself a relevant mitigating factor of great weight, so must the background and mental and emotional development of a youthful defendant be duly considered in assessing his culpability." *Id*. at 2467, citing *Eddings*, 455 US at 116 (quotations omitted). When specifically analyzing Miller's case, the Court found that a sentencer needed to specifically examine all of the circumstances of his background before concluding that life without the possibility of parole was appropriate. *Id*. at 2469. In sum, the Supreme Court has

stressed the importance of considering the *Miller* factors as they apply to the juvenile to mitigate a life without parole sentence. In the same vein, the *Hyatt* Court implored trial courts to do more than pay lip service, and earnestly consider the demands of *Miller* in evaluating the youth's mitigating circumstances.

When considering Mr. Masalmani's chronological age and hallmark features, Judge Druzinski almost exclusively relied on the number of months until Mr. Masalmani's 18th birthday, as opposed to relevant testimony. (Trial Court Opinion, 3-4). The court concluded that his chronological age and its hallmark features "do not justify sentencing defendant differently than an 18 year old criminal defendant." (Trial Court Opinion, 4). Although she briefly mentioned the testimony of Dr. Keating regarding the continuing development of the prefrontal cortex of the brain, and Mr. Masalmani's maturity-level at the time of the crime, Judge Druzinski relied heavily on the fact that Mr. Masalmani was close to being 18 years old at the time he committed the murder. (Trial Court Opinion, 3-4). She essentially disregarded Dr. Keating's 62 pages of testimony on adolescent brain development by stating:

> …while the testimony established that the prefrontal cortex continues to develop into one's mid-twenties, the Court is not free to take this developmental disconnect into consideration when a criminal defendant is over 18. To the contrary, the Court is *required* to impose mandatory life without parole… There was nothing in the testimony or evidence presented which suggests that treating defendant differently from an 18 year old would be warranted in this case.

(Trial Court Opinion, 4).

Dr. Daniel Keating testified at length about how the brain develops and the differences between the adolescent brain and a mature adult brain. (Resentencing, 10/21/14 16-35). The limbic system (or "bottom brain"), which includes the brain's arousal, incentive, and reward

systems, functions as the trigger for a lot of emotional reactions. (Resentencing, 10/21/14 19-20). The bottom brain develops and becomes much more activated around the ages of 13 or 14, at a level that is generally higher than a mature adult will ever experience. (Resentencing, 10/21/14 21). The only brake on the bottom brain is the prefrontal cortex (or "top brain"), which controls higher level brain functions like judgment, decision-making, and impulse control. (Resentencing, 10/21/14 19, 22-23). However, the top brain develops in a linear fashion and does not reach full maturity until the mid-20s. (Resentencing, 10/21/14 23-24). The difference between the fast developing bottom brain and slower developing top brain is called a developmental maturity mismatch. (Resentencing, 10/24/14 24-25).

The adolescent development maturity mismatch manifests itself in several different ways that lead youth to behave differently from mature adults. (Resentencing, 10/21/14 25). For example, when adolescents are in arousing or high emotion situations, impulsivity is more likely to prevail than good judgment, leading adolescents to make poor choices. (Resentencing, 10/21/14 25). Once engaged in negative activities, adolescents become fully absorbed and lack the capacity to reflect on how or whether they should cease those negative activities. (Resentencing, 10/21/14 25).

The pattern of criminal acts Mr. Masalmani committed over a three-day span in this case exemplifies the impulsivity, lack of capacity for self-reflection, and lack of judgment that "render juveniles less culpable than adults." *Miller*, 132 S Ct at 2465, citing *Graham v Florida*, 560 US 48, 70-71; 130 S Ct 2011 (2010). That three-day period remained one continuous situation, during which Mr. Masalmani made a series of impulsive decisions for the moment, without reflecting upon whether they were right or wrong in the moral sense. This is because he was driven by his overactive incentive and arousal systems, without the benefit of the brakes, or

the fully developed prefrontal cortex, a mature adult would have. (See Resentencing, 10/21/14 50-52). Thus, Mr. Masalmani's criminal behaviors exemplified the characteristics of youth that *Miller* requires this Court to consider for its mitigating effect. *Miller*, 132 S Ct at 2467, 2476; (Resentencing, 10/21/14 26).

Judge Druzinski's analysis regarding adolescent brain development represents a clearly erroneous finding of fact. She found Dr. Keating to be a credible witness, and made findings of fact contrary to his testimony. The Court must consider the hallmark characteristics of youth, and how they weigh *against* a sentence of lifetime imprisonment, *Miller*, 132 S Ct at 2469, rather than simply considering how close Mr. Masalmani was to his 18th birthday at the time of the offenses. This is consistent with Dr. Keating's testimony that there is no scientific basis supporting the bright-line legal rules that treat a 17-year-old as a juvenile and an 18-year-old as an adult. (Resentencing, 10/21/14 32-35). In contrast, the science suggests that the developmental maturity mismatch continues through the early-20s, and that full developmental maturity is not reached until the mid-20s. (Resentencing, 10/21/14 32-35).

Next, the court considered the circumstances of the homicide offense, extent of participation, and familial and peer pressure. The court listed the facts of the offense and concluded that "[t]here was no evidence that any of defendant's criminal activity was precipitated by peer or family pressure." (Trial Court Opinion, 6). Furthermore, the court found that Mr. Masalmani had numerous opportunities to abandon his crimes, and since he did not, this factor weighs heavily in favor of finding that a sentence of life without the possibility of parole is appropriate." *Id*.

However, the court failed to consider that Mr. Masalmani does not make any effort to minimize the role he played in the kidnapping and murder of Mr. Landry or the effect that his actions have had on the Landry family. See, FN 1, *infra*; (Social Worker's Sentencing Report,

attached as Appendix A 7-8, 9-10).[5] He takes full responsibility for the offense and expresses remorse for his actions. *Id*.

Similarly the court found that "there was no evidence that the incapacities of youth caused defendant to be unable to participate in his defense," which "favors sentencing defendant to life without the possibility of parole." (Trial Court Opinion, 7). This finding is in direct contradiction of *Miller,* which instructs the sentencing court to consider the nature of the offense with special regard for the "....incompetencies associated with youth—for example...[the juvenile's] incapacity to assist his own attorneys." *Id.* This is because "...the features that distinguish juveniles from adults also put them at a significant disadvantage in criminal proceedings." *Graham,* 560 US at 78. Judge Druzinski was able to state that this factor *favored* imposing a life sentence upon Mr. Masalmani; that somehow the fact that Mr. Masalmani was able to effectively assist his counsel in presenting his defense weighed in favor of imposing a life sentence. The entire analysis of this factor defies logic; a judicial system that penalizes juveniles for having the ability to effectively communicate with their representation is repugnant to all notions of justice and equality.

In finding that the possibility of rehabilitation "weighs in favor of a sentence of life without the possibility of parole," the sentencing court and the appellate court both expressed concern over Dr. Danuloff's inability to predict Mr. Masalmani's future behavior or rehabilitation. *Masalmani*, unpub op at 6; and (Trial Court Opinion, 7). Additionally, the lower courts stressed that Dr. Keating testified that "patterns of behavior are predictive. . . . the worse the circumstances, the more likely it is for nonresilience to be the case." (Trial Court Decision,

[5] SADO employs a staff social worker, Nicole George, MSW. Ms. George evaluates clients and prepares reports detailing her findings for consideration at resentencing proceedings. Ms. George met with Mr. Masalmani to evaluate him for this resentencing. She prepared a report of her observations and findings, which is appended to this Application. (See Appendix A).

7,quoting Resentencing Hearing, 10/24/14 55-56). However, this is a misrepresentation of Dr. Keating's reply to a question of the risks of someone engaging in behavior they have experienced or engaged in previously. Dr. Keating stated:

> Resilience indicates that individuals who have had very negative experiences and themselves have been involved in a variety of negative kinds of behaviors, the predication on average is that there is a lower probability that they will in fact be able to succeed. Nevertheless, there's always a percentage of such individuals who do, nevertheless, succeed.

(Resentencing Hearing, 10/24/14 55).

Furthermore, as indicated above, Dr. Danuloff unequivocally concluded that Mr. Masalmani has the capacity for rehabilitation that warrants a term of years and has demonstrated progress towards rehabilitation. (See, Resentencing Hearing, 10/24/14, 36-56). This sort of cherry-picking by the court was not condoned in *Hyatt*, when the conflict panel remanded the case to the trial court to sentence Hyatt to a term of years. This decision was partially because the panel was concerned that the trial court emphasized the opinion of a psychologist who testified at the *Miller* hearing that the defendant's prognosis for change *in the next five years* was poor. *Hyatt*, __ Mich App at __; slip op at 28. The court found that the capacity for change within five years hardly seemed of any relevance to the decision of whether the minor is irreparably corrupt, and "wholly incapable of rehabilitation for the remainder of his or her life expectancy . . . ." *Id*. The Supreme Court has also discussed how difficult it is for even trained psychologists, let alone a sentencing judge, to make any definitive determinations about a juvenile's capabilities for reform. See *Roper v Simmons*, 543 US 551, 573 (2005).

Here, Mr. Masalmani had only been incarcerated for five years at the time of the resentencing. The *Miller* hearing included numerous examples of Mr. Masalmani's improvements during this time. He has developed the ability to self-reflect, he is working as a

barber, served as a representative for his cell block, and taking GED programming, amongst other things. Yet, the trial court's finding that Mr. Masalmani's "prospects for rehabilitation are minimal" defy Dr. Danuloff's opinion, and the institutional record that shows rehabilitative advances. (Trial Court Opinion, 8). Furthermore, the fact that Mr. Masalmani may not be completely rehabilitated in these five years does not suggest that he is incorrigible; rather, the evidence presented indicates that he is capable of rehabilitation within the next 25 – 60 years.

As discussed throughout, Mr. Masalmani was able to maintain healthy, long-term relationships with the stable, authoritative-type figures in his life, including Christine Day, Jennifer Keller, and William Ladd. (Resentencing, 10/21/14 92, 107; Resentencing, 10/24/14 53). Not only was Mr. Masalmani able to form these significant attachments, but with assistance, he engaged in self-reflection. (Resentencing, 10/21/14 90-93). For example, when confronted about his misbehavior as a child, Mr. Masalmani would reflect that he did not want to misbehave and did not understand why he did so. (Resentencing, 10/21/14 91). Mr. Ladd, who worked with Mr. Masalmani throughout his childhood and teenage years, observed that Mr. Masalmani responded well to consistency and stability. (Resentencing, 10/21/14 130-131). Mr. Masalmani's ability to form and maintain attachments and his ability to engage in introspection are early indicators that he has always had a capacity for rehabilitation.

Mr. Masalmani had a rough start when he first arrived in the Department of Corrections, which is not uncommon for young men who are incarcerated in prison for the first time. (Appendix A 5). Over the years, Mr. Masalmani has made significant progress. (Resentencing, 10/24/14 51). Some of this is the result of Mr. Masalmani's maturation, consistent with his chronological age and natural brain development. (Resentencing, 10/21/14 32-35). However,

much of Mr. Masalmani's progress is due to his own self-help efforts and the time he has spent incarcerated. (Resentencing, 10/24/14 50-52).

In the five years Mr. Masalmani had been incarcerated, it appeared he used his incarceration as an opportunity to focus on gaining tools for continued rehabilitation. (Resentencing, 10/24/14 50-52). For example, Mr. Masalmani made it a goal for himself to avoid getting misconducts in prison. (Resentencing, 10/24/14 50-51). Toward that end, he makes an active effort to exercise self-control when interacting with other prisoners, in order give himself space to think before acting. (Resentencing, 10/24/14 51). Using these techniques, Mr. Masalmani avoided getting any misconducts for well over a year, showing that not only was he making active efforts towards rehabilitation, but that those efforts were working. (Resentencing, 10/24/14 51). Dr. Danuloff observed, "he does the best he can to stay in his head and think which is quite different than the young man who was out on the streets who -- the only thinking that he did then in that amoral way was, what do I need and how do I get it." (Resentencing, 10/24/14 51).

The testimony at the resentencing proceedings established that it is impossible to predict whether a juvenile will in fact be rehabilitated at some future point in time. (Resentencing, 10/21/14 35-36). Due to the unusual procedural posture of this case, this Court does not have to guess. Mr. Masalmani has spent over five years in prison since the time of the sentencing offense, during which time the objective evidence shows he has always exhibited the capacity for rehabilitation and has in fact made progress towards that end.

Mr. Masalmani has shown insight into his choices, the seriousness of his offense, and his destructive behaviors, as discussed with Counsel and fully outlined in Ms. George's report. (Appendix A 8). With acknowledgement of his personal legal consequences, he described the circumstances of his offense, taking responsibility and showing appropriate remorse. (Appendix

A 7-8, 9-10). He has repeatedly expressed his desire to apologize to the people hurt by his crimes, while simultaneously recognizing that there are no words he could say that would ever make up for the life he took. (Appendix A 9-10). This insight is the direct result of his capacity for and progress towards rehabilitation, and shows that Mr. Masalmani is capable of consistent, lasting change. (Appendix A 2-3).

Secondly, the sentencing court found that "it is implausible that [Mr. Masalmani] will experience full rehabilitation without intensive professional assistance – assistance which he is very unlikely to receive in prison." *Masalmani*, unpub op at 7. This reasoning is also flawed in light of legal precedence, and is against the great weight presented at the *Miller* hearing. In *Montgomery*, the Supreme Court noted that "[t]he need for incapacitation is lessened, too, because ordinary adolescent development diminishes the likelihood that a juvenile offender 'forever will be a danger to society.'" 136 S. Ct. at 733,quoting *Miller*, 567 US at 2465, (citation omitted). This implies that juveniles inherently experience development that happens as a part of the growth process into adulthood.

Likewise, the Court in *Montgomery* noted that the defendant presented information to the court on his transition from a troubled youth to a model member of the prison community through helping to establish a prison boxing team, contributing to the prison silkscreen department, and being a model to other inmates. 136 SCt at 736. The Court stated that these submissions were relevant "as an example of one kind of evidence that prisoners might use to demonstrate rehabilitation." *Id*. Furthermore, the Michigan Department of Correction (MDOC) offers rehabilitative programming with a goal to provide prisoners with "greater insight into their previous criminal behavior while providing tools to avoid future criminal acts." *Programming – Prisoner Referral and Placement Process*, Michigan Department of Corrections,

http://www.michigan.gov/corrections/0,4551,7-119-9741_12798-201919--,00.html. Programs such as "Cage Your Rage," "Thinking for Change," and the "Violence Prevention Program" focus on changing the prisoners' thought processes by utilizing cognitive restructuring and behavioral techniques. *Id*.

While these programs alone may not be enough to completely rehabilitate a prisoner, participation in institutional programming along with the natural maturation into adulthood, and a desire to change can demonstrate that such a juvenile prisoner is capable of rehabilitation. Such is the case with Mr. Masalmani. The record shows that Mr. Masalmani has begun to experience both the natural development that comes with adulthood, as well as exemplified institutional rehabilitation though his work and participation in programming at the MDOC. The trial court's conclusion that Mr. Masalmani will not be able to be rehabilitated without special, professional care is not supported by the facts.

Finally, the trial court and appellate court expressed sentiment that Mr. Masalmani's exhibited strides toward rehabilitation are not accurate of his future ability towards rehabilitation because it is only "embryonic," and "likely to reflect manipulation designed to obtain a lesser sentence." *Masalmani*, unpub op at 7 and Trial Court Opinion at 8. This conclusion is an example of the sentencing court paying mere lip service to the demands of *Miller*, and of the appellate court merely rubber-stamping the penalty handed out by the sentencing court.

The Court in *Graham* found that rehabilitation could not justify a life without parole sentence, because such a sentence "foreswears altogether the rehabilitative ideal." *Graham*, 560 US, at 74. Furthermore, juveniles should be given "some meaningful opportunity to obtain release based on demonstrated maturity and rehabilitation." *Id*. at 75. In sum, the *Graham* Court believed that rehabilitation of juveniles should be the goal of incarceration, and that such a goal

would give them a meaningful opportunity to demonstrate their rehabilitation – a goal to look and work towards.

However, the sentencing court in this case punishes Mr. Masalmani for his demonstrated rehabilitation. The appellate court stated "[t]he fact that defendant stopped misbehaving in prison after learning of *Miller* does not necessarily reflect a rudimentary moral awakening, as Dr. Danuloff claimed. Defendant's improved behavior is just as, if not more, likely to reflect manipulation designed to obtain a lesser sentence . . . ." *Masalmani*, unpub op at 7. Even if the facts presented at the *Miller* hearing supported this conclusion, there is no reason to believe that this should be found in favor of a sentence of life without parole. Having the possibility of parole in 25 – 60 years in the future as a way to encourage maturation and rehabilitation, is a meaningful goal to work towards and one that society should want to encourage, especially for juvenile offenders. Indeed, if Mr. Masalmani's current demonstrated rehabilitation after 5 years' incarceration does not prove to be genuine, the parole board will have the benefit of years of institutional and behavioral records in order to make an accurate decision, instead of the sentencing court making an unfounded guess.

That children have a unique capacity for rehabilitation is at the heart of the *Miller* decision and so necessarily is central to this Court's analysis. This is because a sentence of life without parole "forswears altogether the rehabilitative ideal…[and]… reflects an irrevocable judgment about an offender's value and place in society…." *Miller*, 132 S Ct at 2465, citing *Graham* (internal quotation marks omitted). Mr. Masalmani, through his long-term positive relationships, has long exhibited the capacity for rehabilitation. (See, e.g. Resentencing, 10/21/14 107). Over the past few years, he has taken advantage of the limited resources available to him and made demonstrable progress towards rehabilitation. (Resentencing, 10/24/14 53). All of this evidence

objectively shows that Mr. Masalmani is not the incorrigible youth who should be sentenced to die in prison. *Miller*, 132 S Ct at 2469.

Lastly, the trial court examined Mr. Masalmani's family and home environment. The court concluded that there was essentially uncontroverted evidence that the defendant's family and home environment was terrible. This was the only mitigating factor that the court found weighed in Mr. Masalmani's favor. (Trial Court Opinion, 6).

The record before this Court demonstrates that Mr. Masalmani is less culpable than a mature adult who committed the same offenses would be, because his crimes reflect the impulsivity, impetuosity, and lack of judgment that is characteristic of the adolescent maturity mismatch experienced by youths. The lower courts' conclusion that Mr. Masalmani is the rare juvenile whose crime reflects irreparable corruption is the result of a lack of an individualized sentence, not based on the particularities of Mr. Masalmani's background or his exhibited rehabilitation. This Court should carefully reconsider the facts presented at the *Miller* hearing in order to ensure fairness in the face of compelling mitigating evidence.

### *C. The Court Improperly weighed the Miller Factors and Failed to Consider Them Exclusively for their Mitigating Effect*

The trial court erred when it improperly applied the *Miller* sentencing factors by failing to consider those factors *exclusively* for their potential mitigating effect on the sentencing decision, which is required by *Miller*. Therefore the sentencing hearing did not comply with *Miller* and imposed a sentence that violated Due Process and the Eighth Amendment.

At its core, *Miller* establishes that "...a judge or jury must have the opportunity to consider *mitigating* circumstances before imposing the harshest possible penalty for juveniles." *Id.* at 2476 (emphasis added). This conclusion was discussed at length by the conflict panel in *Hyatt*.

The panel found that while MCL 769.25(7) uses the term "aggravating and mitigating circumstances," the analysis on the *Miller* factors "does not aggravate punishment; instead, the analysis acts to caution the sentencing judge against imposing the maximum punishment authorized by the jury's verdict." *Hyatt*, __ Mich App at __; slip op at 18. Furthermore, it points out that the *Miller* decision is rife with arguments concerning why juveniles are different from adults and "why these *differences diminish the culpability of juveniles*." Id. Finally, the panel concluded that "MCL 769.25 sets out a maximum punishment . . . and mandates that the sentencing judge consider the *Miller* factors in a way that mitigates, rather than enhances, the maximum available penalty." *Id*. at 19. Thus, each of the *Miller* factors must be considered for its *mitigating* effect and should not be viewed as an aggravating factor. *Id.* at 2467, 2476. When analyzing the *Miller* factors in Mr. Masalmani's case, Judge Druzinski used all the factors to aggravate the sentence, none were used to mitigate, and as such, her entire analysis violates the mandate of *Miller v Alabama.*

The analysis employed by the Court was on-its-face in compliance with *Miller*, as Judge Druzinski went through each of the *Miller* factors and how they applied to Mr. Masalmani's case: (1) chronological age and hallmark features, (2) family and home environment, (3) circumstances of the homicide offense, (4) incapacities of youth, and (5) possibility of rehabilitation. (Trial Court Opinion, 3-8). However, all five factors were inappropriately analyzed by Judge Druzinski, and they were all used to aggravate Mr. Masalmani's sentence as opposed to mitigating it. Judge Druzinski's improper consideration of the *Miller* factors constitutes an error because the factors must be considered for their potential *mitigating* effect and should not be viewed as an aggravating factor. *Id.* at 2467, 2476.

Following her discussion of each *Miller* factor, Judge Druzinski stated whether or not each factor supported the imposition of a life sentence without parole and its weight in that determination. Apart from the circumstances of Mr. Masalmani's family and home environment, Judge Druzinski found that each *Miller* factor supported or favored a life sentence without parole. (Trial Court Opinion, 4-7). While the sentencing courts have discretion when considering the *Miller* factors, it may be an abuse of discretion "if a sentencing court fails to consider a relevant factor that should have received significant weight, [or] gives significant weight to an improper or irrelevant factor . . . ." *Hyatt*, __ Mich App at __; slip op at 18, quoting *Haack*, 403 F3d at 1004).

After discussing the circumstances of Mr. Masalmani's homicide offense, Judge Druzinski found that, "this factor *weighs heavily in favor* of finding that a sentence of life without the possibility of parole is appropriate." (Trial Court Opinion, 6, emphasis added). After discussing evidence presented regarding Mr. Masalmani's possibility of rehabilitation, Judge Druzinski found that factor also "…*favors* a sentence of life without the possibility of parole." (Trial Court Opinion, 8, emphasis added).

The only factor that was not found to favor life imprisonment for Mr. Masalmani was his family and home environment, which Judge Druzinski found would "*likely* weigh in defendant's behavior," (Trial Court Opinion, 6, emphasis added), but went on to say in her conclusion that his terrible upbringing "also suggests that defendant's prospects for rehabilitation are minimal." (Trial Court Opinion, 8). This seems to be a conclusion based on her personal opinion, since support of this statement is not found anywhere in the record.

Each of the *Miller* factors should be considered for its mitigating effect. A proper analysis would find the potential mitigating effect of each factor, which may be zero for some; but the

factors should never be used to aggravate the sentence. These hearings are intended to protect juveniles from the harshness of mandatory sentences by accounting for circumstances in their lives that show they are *not* irreparably corrupt; *Miller* sentencing hearings are not intended to prove irreparable corruption. If following a *Miller* sentencing hearing, the Judge finds that no factors favor mitigation of the sentence, then life imprisonment *may* be appropriate. However, without proper analysis focused on the potential mitigating effect of each factor, the hearings are essentially illusory and the Judge will effectively impose mandatory life sentences on juveniles, violating *Miller* and the Eighth Amendment.

### *D. The Court Improperly weighed the circumstances of the underlying offense*

Judge Druzinski found that the circumstances of the homicide offense "weighs heavily in favor of finding that a sentence of life without the possibility of parole is appropriate" and this factor seems to be the strong hold of the sentencing decision. (Trial Court Opinion, 6). She then went on to say that "[t]here is nothing in the facts and circumstances of the crime which would warrant anything less than life in prison without the possibility of parole," a statement that demonstrates she allowed the circumstances of the crime to be a major aggravating factor in his sentencing determination, which violates *Miller*. This decision was supported on the fact that there was no evidence that showed that Mr. Masalmani was precipitated by peer or family pressure, and because he had "numerous opportunities to abandon his plan." (Trial Court Opinion, 6). Moreover, in the appellate court's opinion when discussing the factor of Mr. Masalmani's age and its hallmark features, the court focused primarily on his involvement in a horrific, violent crime. *Masalmani*, unpub op at 4.

To suggest the facts underlying the homicide conviction alone are sufficient to support a sentence of life without the possibility of parole for a juvenile homicide offender is contrary to

the clear mandate of the *Miller* decision. *Miller*, 132 S Ct at 2468.[6] While this Court must consider the nature of the offense, *Miller* does not suggest that this Court should consider the nature of the offense for its aggravating effect. *Miller*, 132 S Ct at 2468. Individualized sentencing for juveniles requires a careful consideration of all the mitigating factors, described in detail in *Miller* and the prior Supreme Court decisions that underlie *Miller's* mandate. *Id.*; E.g. *Graham*, 560 US at 67-69, 72-75. Indeed, the *Hyatt* conflict panel has warned of overweighing the circumstances of the offense in a life without parole sentencing determination:

> [N]early every situation in which a sentencing court is asked to weigh in on the appropriateness of a life-without-parole sentence will involve heinous and oftentimes abhorrent details. . . . However, the fact that a vile offense occurred is not enough, by itself, to warrant imposition of a life-without parole sentence.

*Hyatt*, __ Mich App at __; slip op at 24.

As such, the fact that Mr. Masalmani engaged in a violent crime is not enough, in itself, to warrant a life-without-parole sentence in light of significant mitigating evidence. In regards to the circumstances of the homicide offense, Mr. Masalmani does not make any effort to minimize the role he played in the kidnapping and murder of Mr. Landry or the effect that his actions have had on the Landry family. See, FN 1, *infra*; (Social Worker's Sentencing Report, attached as Appendix A 7-8, 9-10). He takes full responsibility for the offense and expresses remorse for his actions. *Id*.

The pattern of criminal acts Mr. Masalmani committed over a three-day span in this case exemplifies the impulsivity, lack of capacity for self-reflection, and lack of judgment that

[6] This is why states are not free to develop criminal statutes making a sentence of life without the possibility of parole mandatory for juvenile homicide offenders where the offense involves specific, particularly heinous factual predicates. *Miller*, 132 S Ct at 2469 ("We therefore hold that the Eighth Amendment forbids a sentencing scheme that mandates life in prison without the possibility of parole for juvenile offenders.")

"render juveniles less culpable than adults." *Miller*, 132 S Ct at 2465, citing *Graham v Florida*, 560 US 48, 70-71; 130 S Ct 2011 (2010). Using Dr. Keating's analogy, from the time Mr. Masalmani kidnapped Mr. Landry in order to use his car and take his money, until he was captured by police, Mr. Masalmani lacked the capacity to "get off the train," or to even reflect on whether he should "be on the train" in the first place. (Resentencing, 10/21/14 25). That three-day period remained one continuous situation, during which Mr. Masalmani made a series of impulsive decisions for the moment, without reflecting upon whether they were right or wrong in the moral sense. This is because he was driven by his overactive incentive and arousal systems, without the benefit of the brakes, or the fully developed prefrontal cortex, a mature adult would have. (See Resentencing, 10/21/14 50-52). Thus, Mr. Masalmani's criminal behaviors exemplified the characteristics of youth that *Miller* requires this Court to consider for its mitigating effect. *Miller*, 132 S Ct at 2467, 2476; (Resentencing, 10/21/14 26).

### *E. The Trial Court Improperly weighed age and its hallmark features*

In addition to considering the circumstances of the crime for its aggravating effect, rather than the mitigating effect of the incapacities of Mr. Masalmani's youth, as required, Judge Druzinski also improperly analyzed the incapacities of youth outside of its relation to the circumstances of the crime. The basis of the sentencing court's decision that "this factor favors imposing a sentence of life without the possibility of parole" does not comport to the basic fundamental principles of *Miller*. (Trial Court Opinion, 4). *Miller* requires considering youth and found that mandatory sentencing schemes violated the principle of proportionality by forcing the sentencing authority to ignore "age and age-related characteristics . . . ." *Miller* 132 S Ct at 2475. *Graham* has cautioned that "[b]y removing youth from the balance – by subjecting a juvenile to

the same life-without-parole sentence applicable to an adult [mandatory sentencing schemes] prohibit a sentencing authority from assessing whether the law's harshest term of imprisonment proportionately punishes a juvenile offender." *Graham*, 560 US at 68. Yet despite the strong language set out by the Supreme Court emphasizing the importance of considering youth in the sentencing determination, Judge Druzinski has completely removed youth from the analysis.

First, the incapacities of youth are only relevant in a *Miller* hearing when such youthful incapacities cause a defendant to be unable to effectively assist his counsel in preparing his defense. (Trial Court Opinion, 7). However, in Mr. Masalmani's case no evidence was introduced to address this factor, since it was not an issue, and as such should not have been considered at all – it offers no mitigating effect. In interpreting this factor, somehow Judge Druzinski was able to state that this factor *favored* imposing a life sentence upon Mr. Masalmani; that somehow the fact that Mr. Masalmani was able to effectively assist his counsel in presenting his defense weighed in favor of imposing a life sentence. The entire analysis of this factor defies logic.

Dr. Keating testified that the developmental maturity mismatch between the top and bottom brain is present in *every* adolescent as it is a part of human development. (Resentencing, 10/21/14 23-25). Regardless of a juvenile's proximity to age 18, the hallmark features of their age *must* be considered by the court prior to the imposition of LWOP. It defies all notions of logic to refuse to consider Mr. Masalmani's brain development at the time of the crime, just because he would not be entitled to such consideration if he committed the act several months later, at age 18. Such reasoning undercuts the required *Miller* analysis and essentially renders the decision a nullity.

The flaw in Judge Druzinski's reasoning is further exemplified in that she used the same analysis with Co-Defendant Taylor. Judge Druzinski noted that Mr. Masalmani was months shy of his 18th birthday "*[d]efendant was only 4 months away from being an adult*," (Trial Court Opinion, 4, emphasis added), while Mr. Taylor "*was a mere 14 months shy of his 18th birthday* at the time of his offense." (Taylor Trial Court Opinion, 4, emphasis added). In both cases she found the distance to 18 was short enough to not see age as a mitigating factor.

Similarly, the appellate court, in agreeing with the trial court's analysis, added that William Ladd (Mr. Masalmani's guardian ad litem) testified that Mr. Masalmani fell within the middle range in terms of maturity of the 5,000 to 8,000 children with whom he worked with over 30 years. *Masalmani*, unpub op at 5. However, the court failed to consider the full context of Mr. Ladd's testimony. Mr. Ladd testified:

> [A]ll of the children that I represented have been kids who were involved or trouble kids or are in difficult circumstances based upon their home situations. So they haven't had positive family experiences. In terms of maturity, Ihab was probably in the middle. *That's not very mature compared to the general population.* And in terms of being able to deal with them, he was one of the easiest kids to deal with from my point of view.

Resentencing, 10/21/14 109 (emphasis added).

A decision to sentence a juvenile to die in prison should not and cannot be based on "ifs." Mr. Masalmani committed the crimes for which he was convicted at age 17, and therefore it is an error for the court to disregard the hallmark features of his age in regards to his capacity to make wise decisions. The fact that his decision-making skills will continue developing into his mid-twenties (past the age cut-off for *Miller* sentencing hearings) does not change the fact that a diminished decision-making capacity is a hallmark feature of his age, and as such, Mr.

Masalmani is entitled to have the Court meaningfully consider such uncontroverted evidence. Acknowledging testimony is not akin to meaningful consideration.

The developmental stage of Mr. Masalmani's brain shows that his decision-making skills and understanding of right and wrong were not that of an adult, and thus this factor is a mitigating factor favoring a sentence that allows for a meaningful opportunity for parole. If the closeness in age a defendant is to 18 years forms the basis of sentencing a juvenile to life in prison, then the courts could slide down a slippery slope to a future where all *Miller* hearings are illusory and unconstitutional mandatory life sentences for juveniles become the norm. The courts have a duty to protect the rights of juveniles and to give them as much of a chance at success in life as they possibly can. This Court cannot accept or condone the logic of denying sentencing relief based on how close the defendant is age 18. This is especially true in light of the Supreme Court's acknowledgement that age 18 is an arbitrary cut-off used by society and that science supports that ones brain continues to mature well into the 20's. The trial court erred in using age as an aggravating factor rather than a mitigating factor as required by *Miller*.

### *F. The Trial Court Improperly weighed family and family environment*

In imposing sentence, Judge Druzinski found that the terrible circumstances of Mr. Masalmani's childhood was the only factor that weighed in his favor and against imposing a life sentence without the option of parole. (Trial Court Opinion, 5-6). However, she later used Mr. Masalmani's childhood against him: "The…difficulty of defendant's upbringing – the only factor which could be said to weigh in favor of an indeterminate sentence – also suggests that defendant's prospects for rehabilitation are minimal." *Id.* at 8. The appellate court supported this conclusion by finding that his background was not mitigating because "it also indicates that he

faces significant challenges in improving himself." The court's statement regarding the influence Mr. Masalmani's childhood has on his prospects for rehabilitation is not supported by any testimony.

On cross examination of Mr. Ladd, the prosecutor frequently referenced his disapproval of Mr. Ladd's assertion that the adults in Mr. Masalmani's life failed to adequately care for him, or give him the best opportunities to succeed. (Resentencing Hearing, 10/21/2014, 124-129) The prosecutor adamantly pressed that it is Mr. Masalmani, not his parents, foster parents, or other legal guardians who are to blame for his poor development and failure to adapt to living arrangements. *Id*. However, assigning responsibility for Mr. Masalmani's circumstances to a group of people or an individual is irrelevant. It is the impulsivity of the crimes and the juvenile's inability to reflect and act to stop the sequence of events that is the focus. The circumstances of Mr. Masalmani's childhood and the characteristics of youth more generally, are significant for two reasons. First, just as described by the Court in *Miller*, the circumstances of Mr. Masalmani's family and unstable home environments are relevant *mitigating* factors that weigh against a sentence of lifetime incarceration, just like chronological age and its attendant characteristics. *Miller*, 132 S Ct at 2467-2468. The *Miller* court specifically mentions Miller's parental abuse, neglect, and experiences in the foster care system as mitigating circumstances that should be considered before concluding that a life without parole sentence is appropriate. *Id*. If a juvenile's difficult family background was a sign of incorrigibility rather than mitigation, as Judge Druzinski implies, the Supreme Court's discussion of this topic would be extraneous.

Second, this testimony objectively shows that Mr. Masalmani's criminal behaviors were not evidence of incorrigibility or irreparable corruption, but rather reflected Mr. Masalmani coping with incredibly difficult living situations in the only manner he knew. The attachments Mr.

Masalmani formed with Ms. Keller, Mr. Ladd, and Ms. Day, along with Mr. Masalmani's demonstrated ability to engage in introspection during his teenage years show that he is not "the rare juvenile offender whose crime reflects irreparable corruption."[7] *Miller*, 132 S Ct at 2469, citing *Roper v Simmons*, 543 US 551, 573; 125 S Ct 1183 (2005).

At the time Mr. Masalmani committed his crime he was 17. He had never received consistent attention, love and support to steer him off a dangerous path and help him develop skills that would include handling his impulsivity. The testimony offered by those who worked with him throughout his childhood shows that his lack of support from parental figures and his unstable home life made Mr. Masalmani at risk of a life of crime. Mr. Ladd testified regarding his experiences with children who have grown up in foster care, and their propensity to make poor decisions: "…the thing is, is that it's not necessarily a good decision by the kid. They're kids. They make lots of bad decisions, but it's understandable when we put them in that circumstance." (Resentencing, 10/21/14 126). "Unfortunately, if we create situations that make it more likely for kids to fail, it's more likely that they're going to fail. And that's what had happened with Ihab, and he's responsible ultimately for what happened, but we're responsible for the process that got him there." (Resentencing, 10/21/14 129).

Mr. Masalmani made bad choices, that fact is undisputed. However, sentencing him to die in prison is exactly the type of treatment that placed him in the situation he is in today. Those who were supposed to protect him and ensure he was headed on the right path, failed Mr. Masalmani

[7] At the resentencing hearing, Dr. Lyle Danuloff, a forensic psychologist, opined that Mr. Masalmani is not the rare juvenile offender whose crime "reflects irreparable corruption" warranting a sentence of life without the possibility of parole. (Resentencing, 10/24/14 57). Dr. Danuloff suggested that Mr. Masalmani might have been "irreparably corrupt" at one point in time, but no longer is. (Resentencing, 10/24/14 57). He clarified that he was not saying Mr. Masalmani was in fact irreparably corrupt, but rather was "postdict[ing] his behavior...from society's standpoint." (Resentencing, 10/24/14 57-58). He further clarified that he was not using the term as a clinician, but rather was speaking to the acts Mr. Masalmani committed and acknowledged he was not using the term in the legal sense. (Resentencing, 10/24/14 60).

miserably. It is the responsibility of this Court to right those wrongs when it can, and to prevent their occurrence in the future. Giving Mr. Masalmani an opportunity for parole is the responsible just sentence in this case.

### *G. The Trial Court improperly weighed the possibility of rehabilitation*

Finally, when Judge Druzinski considered Mr. Masalmani's potential for rehabilitation, she dramatically pared the testimony offered in order to reach the outcome she desired – sentencing Mr. Masalmani to die in prison. The court used testimony regarding Mr. Masalmani's recent good behavior in prison to exhibit his "manipulative" nature, rather than an indication of his rehabilitative efforts: "The Court finds it rather telling that defendant only began to avoid misconducts once the possibility of parole became a reality with the Supreme Court's decision in *Miller*." (Trial Court Opinion, 8). Mr. Masalmani was a survivor who spent most of his childhood alone, abused, or on the streets. He did what he thought he had to in order to survive, no matter the cost. When someone with such a background is told at 17 years old that he will die in prison, he has no motivation to change. The fact that Mr. Masalmani was given hope for a future and a chance at freedom following the Supreme Court's decision in *Miller v Alabama* is not indicative of his manipulative abilities (in fact not a single witness testified that Mr. Masalmani ever exhibited any type of manipulative behavior), but instead shows that given the opportunity to succeed, he has demonstrated the potential to change. Justice cannot be served without offering Mr. Masalmani a meaningful opportunity for parole.

In regards to an adolescent criminal's potential for rehabilitation, Dr. Keating testified that based on current science, there is no way to conclusively determine, beyond a reasonable doubt, whether or not an individual is capable of rehabilitation. (Resentencing, 10/21/14 55-58).

However he did state that "…individuals who were incarcerated for serious crimes at a relatively early age, the majority of them desist from criminal behavior later on in life." (Resentencing, 10/21/14 58). Somehow the Court used this testimony to further its position that life imprisonment without parole should be imposed – an assertion that completely defies all logical reasoning.

The prosecutor, in his closing remarks, actually stated that since the science is not able to inform the Court whether or not someone may be rehabilitated or not with complete certainty, the Court should focus on the nature of his crime as opposed to his potential for rehabilitation – an argument that, if followed, would completely violate the holding of *Miller*. (Resentencing, 10/24/14 93-94). If the science is not able to show affirmatively or negatively that an individual is likely to change, there is no way to say with complete confidence, beyond a reasonable doubt, that a person's corruption is irreparable. As Judge Beckering reasoned in her concurrence in *Hyatt*, the only responsible decision in light of expert testimony that expressly states there is no scientific way to predict future behavior is to reevaluate the person's mental state and degree of "corruption" at a later time, as is done by the parole board. *Hyatt*, __ Mich App at __; slip op at 6 (Beckering, J., concurring).

However, demonstrated rehabilitation should not be discounted or overlooked in the determination. Mr. Masalmani used his time in solitary to learn about people in general, how they should treat one another, and the difference between being righteous and being evil. An individual who seeks to understand why their actions were wrong and how he can become a better person is not irreparably corrupt, and deserves a future opportunity to prove that to a parole board. Mr. Masalmani, through his long-term positive relationships, has exhibited the capacity for rehabilitation. (See, e.g. Resentencing, 10/21/14 107). Over the past few years, Mr.

Masalmani has taken advantage of the limited resources available to him and made demonstrable progress towards rehabilitation. (Resentencing, 10/24/14 53). All of this evidence objectively shows that Mr. Masalmani is not the incorrigible youth who should be sentenced to die in prison. *Miller*, 132 S Ct at 2469.

### H. The Court Of Appeals Failed To Apply A "Searching Inquiry" In Its Review

Upon review of the sentence of life without parole, the appellate court rubber-stamped this decision by not initially viewing the result as inherently suspect, or applying a heightened degree of scrutiny regarding whether the sentence was proportionate in light of the mitigating evidence. Appellate courts have a responsibility to ensure they do not rubber-stamp the decisions by the trial courts in order to safeguard that a life-without-parole sentence will only be constitutionally proportionate for the truly rare juvenile. *Hyatt*, __ Mich App at __; slip op at 27. As the *Hyatt* conflict panel described, the appellate court must give meaningful review to a juvenile life without parole sentence, and should view such a sentence as inherently suspect. *Id*. at ___; slip op at 26.

Furthermore, the *Hyatt* panel stated that even under an abuse of direction standard, a reviewing court should apply a "searching inquiry into the record and the understanding that, more likely than not, the sentence imposed is disproportionate." *Id*. at 26. The panel noted that MCL 769.25 requires discretion of the sentencing court in weighing a variety of factors in determining a juvenile life-without-parole sentence. However, upon appellate review, the court must be cautious of an abuse of discretion if "a sentencing court fails to consider a relevant factor that should have received significant weight, [or] gives significant weight to an improper or irrelevant factor…." *United States v Haack*, 403 F3d 997, 1004 (CA 8, 2005).

In the review of Mr. Masalmani's sentence to life without parole, the Court of Appeals simply restated the trial court's conclusions and analysis for each of the *Miller* factors. The Court of appeals also disregarded the youth brain science testimony and its relevancy in Mr. Masalmani's case. The court found it disturbing that Mr. Masalmani commented to Dr. Danuloff that his actions were partially righteous because he did not have a choice. *Masalmani*, unpub op at 7. However, it totally disregarded the fact that Mr. Masalmani also characterized his actions as "evil," or the fact that he has taken full responsibility for his actions and is remorseful. (Resentencing Hearing, 10/24/14 54). The court also concluded that Mr. Masalmani's possibility for rehabilitation was unlikely "without intensive professional assistance," contrary to all of the evidence presented on Mr. Masalmani's rehabilitation to date as described earlier.

Like the trial court, the appellate court failed to fully consider all of the mitigating facts presented in the *Miller* hearing that show that Mr. Masalmani is not the incorrigible, truly rare youth. The appellate court simply rubbed-stamped the trial court's decision by not viewing the sentence as inherently suspect, and failing find an abuse of discretion in the trial court's application of the mitigating facts or in its excessive weighing of the circumstances of the offense. Therefore the appellate review violated the principle of proportionality, which "requires sentences imposed by the trial court to be proportionate to the seriousness of the circumstances surrounding the offense and the offender." *Milbourn*, 435 Mich at 636, 654.

## II. IHAB MASALMANI, CONVICTED OF A FIRST-DEGREE MURDER COMMITTED WHEN HE WAS UNDER THE AGE OF 18, IS ENTITLED TO A JURY DETERMINATION OF ANY/ALL FACTS THAT EXPOSE HIM TO A LIFE WITHOUT PAROLE SENTENCE, WHICH IS A DEPARTURE FROM THE DEFAULT TERM OF YEARS SENTENCE.

The trial court erred by determining any and all facts that subjected Mr. Masalmani to the greater sentence of life without parole.

The Court of Appeals published an opinion in *People v Skinner*, ___ Mich App ___; ___ NW2d ___ (Docket No. 317892) (2015), which instructs sentencing courts to empanel a jury to make a determination in a *Miller* hearing. *Skinner* is binding on the Court. MCR 7.215(C)(2). And "changes to a criminal law are generally given retrospective application to cases pending on appeal as of the date of the filing of the opinion containing the new rule." *People v Carruthers*, 301 Mich App 590, 615 837 NW2d 16 (2013).

Pursuant to *Skinner*, this case must be remanded to the trial court where the following procedure is followed[8]:

> "[F]ollowing a conviction of first-degree murder and a motion by the prosecuting attorney for a life without parole sentence, absent defendant's waiver, the court should impanel a jury and hold a sentencing hearing where the prosecution is tasked with proving that the factors in Miller support that the juvenile's offense reflects "irreparable corruption" beyond a reasonable doubt. During this hearing, both sides must be afforded the opportunity to present relevant evidence and each victim must be afforded the opportunity to offer testimony in accord with MCL 769.25(8). Following the close of proofs, the trial court should instruct the jury that it must consider, whether in light of the factors set forth in Miller and any other relevant evidence, the defendant's offense reflects irreparable corruption beyond a reasonable doubt sufficient to impose a sentence of life without parole. Alternatively, if the jury

[8] Mr. Masalmani has been convicted of first-degree murder and the prosecution timely filed the motion for a life sentence so there would be no need for the filing of any additional motion.

> decides this question in the negative, then the court should use its discretion to sentence the juvenile to a term-of-years in accord with MCL 769.25(9)."

*Skinner*, slip op at 23.

A conflict panel in *Hyatt* rejected the decision in *Skinner* and ruled that "[a] judge, not a jury, is to make the determination of whether to impose a life-without-parole sentence or a term-of-years sentence under MCL 769.25." *Hyatt*, __ Mich App at __; slip op at 21. Mr. Masalmani has a Sixth Amendment right to a jury in determining if he is the truly rare juvenile that should be sentenced to life without parole.

## SUMMARY AND RELIEF

**WHEREFORE**, for the foregoing reasons, Ihab Masalmani asks that this Honorable Court grant this Application or alternatively peremptorily reverse the Court of Appeals and trial court decisions and remand this case to the trial court to empanel a jury to determine whether Ihab is the rare youth who is irreparably corrupt and deserving of a life sentence.